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No. 85-2057

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

Appellant,

-against-

STATE BOARD OF EQUALIZATION AND
ASSESSMENT, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM
ON BEHALF OF INTERVENOR-APPELLEE
CITY OF NEW YORK

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July 30, 1986

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Questions Presented

The position of New York City, on this appeal is in all significant respects the same as that of appellee State Board of Equalization and Assessment. Accordingly, the City joins in the brief submitted on behalf of SBEA and discusses in this brief only the following questions:

1. Whether New York State Real Property Tax Law, §744(1), clarifying the binding effect of the State equalization rate in a challenge to a special franchise assessment as unequal, denies appellant due process, equal protection or any other federal right.

2. Whether this proceeding is justiciable in view of the fact that the

equalization factor is only one element in finding the assessed value of property for tax purposes and that value in the case at bar has not been finally determined.

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STATE BOARD OF EQUALIZATION AND
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ON APPEAL FROM THE COURT OF APPEALS
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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, City of New York (hereafter the City), intervenor in the proceedings below and one of the appellees before this Court, moves that the appeal filed on behalf of appellant Consolidated Edison Company of New York, Inc. (sometimes Con Ed) be dismissed or, in the

alternative, that the judgment of the Court of Appeals of the State of New York be affirmed.

Opinions Below

The opinion of the New York Court of Appeals is reported at 67 N.Y.2d 783, 501 N.Y.S.2d 22, 492 N.E.2d 130 (1986). The opinion of the Appellate Division, Third Department, is reported at 103 A.D.2d 453, 480 N.Y.S.2d 789 (1984). The opinion of Special Term of the Supreme Court for Albany County is reported at 120 Misc.2d 617, 466 N.Y.S.2d 575 (1983).[1] These opinions are reproduced at J.S.A-1, 6, 13, 14-24.

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[1] References in parentheses to "J.S." refer to pages of Jurisdictional Statement. Numerical references prefixed by "A" refer to the Appendix to the Jurisdictional Statement.

JURISDICTION

The Court of Appeals decision was issued on March 18, 1986. Appellant filed a Notice of Appeal to this Court with the Clerk of the Court of Appeals on June 7, 1986, and with the Clerk of Albany County June 11, 1986. A-28-31. Allegedly, this Court has jurisdiction under 28 U.S.C. §1257(2).

STATUTORY PROVISIONS

The justiciability question which the City raises and the only basis for appeal invoked by Con Ed involves 28 U.S.C. §1257(2) (J.S.3). In pertinent part this provides:

> Final judgments or decrees rendered by the highest court of a state ... may be reviewed ... [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution...

The State statute complained of is New York Real Property Tax Law (RPTL),

§744(1). It is set forth in full at page 1 of the Appendix hereto. Insofar as relevant it provides:

> ...evidence on the issue of whether a special franchise assessment is unequal shall be limited to the state equalization rate ... [which] ... shall be binding and conclusive on the parties upon any such issue.

STATEMENT

The City joins in the Counter-Statement of the Case presented in pages 1 to 7, inclusive, of SBEA's motion papers. Added herein is only additional detail as to the present status of the litigation involving various other appellees, political subdivisions like the City, in which Con Ed also maintains special franchises, to stress the wide dependency of governmental entities upon the tax revenues derived from this source.

Appellant initially urged all three grounds (not two; J.S. 6) provided under New York law for reviewing assessments:

namely overvaluation, inequality and illegality (J.S. A-7). At issue are, or were, claims in some thirty-five taxing jurisdictions for the twelve years from 1974-1985. Their present status, illustrative of the lack of finality, is:

a) following initial consolidation of the petitions from 1974 through 1977 into a single proceeding, SBEA and the municipalities moved for and were granted dismissal of the illegality claims therein; this order was appealed to the State's intermediate appellate court, which affirmed, and Con Ed's motion for leave to appeal to the highest State court was denied[2]. The

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[2] Consolidated Edison Company, Inc. v. State Board of Equalization and Assessment, _____ Misc. 2d _____ (Sup. Ct., Albany Cnty, Conway, J;NOR); 60 A.D.2d 356, 401 N.Y.S. 2d 871 (3d Dept. 1978), mot. for lv. to app. den., 45 N.Y.2d 706, 280 N.E. 2d 338, 408 N.Y.S.2d 1025 (1978).

illegality claims for the remaining eight years are sub judice at the trial court level.

b) the overvaluation claims for all twelve years have been tried and are sub judice at the trial court level except for those relating to 1974, which have been dismissed.[3]

c) as to the inequality portions, assessment review on grounds of inequality requires that a petitioner establish two facts: the full value of the property and the equalization rate. Either without the other is meaningless, because at issue is the product of the two, and the same product can be produced with an infinite array of rates so long as a corresponding infinite array of values remains possible.

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[3] Appendix, p. 2

The full value issues of Con Ed's special franchises are all sub judice at the trial court level except for the 1974 claims. The petitions for this year have been dismissed in all respects. Motions by the municipalities and SBEA for partial summary judgment on the question of the equalization rate were granted by two separate orders. That relating to the last eight years in issue (1978 through 1985) was made on July 10, 1986, and the time to appeal therefrom to the intermediate appellate court has not yet expired. The order relating to the first four years, 1974 through 1977, was appealed by Con Ed, affirmed by the highest State court, and is now the subject of this appeal. There is no doubt that Con Ed will appeal the second also.

In sum, none of the illegality questions are presented here, the time to appeal the order dismissing those for the first four

years having long expired and those for the next eight years still sub judice at the trial court level. None of the value questions are presented here, all being sub judice at the trial court level except those relating to 1974, which have been dismissed. Eight of the twelve years of equalization rate questions have only recently been decided at the trial court level, and will be appealed to the State's intermediate appellate court. What is in issue here are soley the remaining four years of equalization rate.

In essence, it is appellant's position that there is only one class of property in New York and that, because the statute in issue limits a hearing on equalization rates with respect to special franchises, its equal protection rights as well as its due process rights have been violated (J.S. 12-14, 14-16).

SBEA, all the intervening municipalities, and the courts below maintain that appellant is in error on every point, to which the City adds that this case is not yet even justiciable, may never become so, and is already partly moot.

ARGUMENT

RPTL §744(1) DOES NOT DEPRIVE APPELLANT OF THE RIGHT TO ANY HEARING ON THE EQUALIZATION RATE TO WHICH IT IS OTHERWISE ENTITLED. MOREOVER, THE SEPARATE CLASSIFICATION OF SPECIAL FRANCHISES FOR TAX PURPOSES HAS A RATIONAL BASIS AND DOES NOT VIOLATE EQUAL PROTECTION.

1. Due Process

Appellant's contention that it has a right to a hearing with respect to the State rate is flawed on several grounds. Initially, it is not constitutionally entitled to any hearing at all, since it is well settled that ascertaining an equalization rate is a legislative, not an adjudicatory, function.[4] To

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[4] "I am of the view that due process does not require such a review. The equalization rate is considered a legislative act and thus, no hearing, much less a full hearing, is constitutionally required. See Bi-Metallic Co. v. Colorado, 239 US 441; Kentucky R.R. Tax Cases, 115 US 321, supra; State

(Footnote Continued)

this should be added that, in any event, it is not entitled to multiple hearings, and at least one is already provided elsewhere in the statutes.

Although it is true that a hearing on the equalization rate is foreclosed in an RPTL Article 7 proceeding, its role as only one element in determining assessed value is evidenced by the fact that, notwithstanding, appellant concluded a full hearing with respect to value under Article 7. The

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(Footnote Continued)
R.R. Tax Cases, 92 US 575.) Moreover the State Administrative Procedure Act, the provisions of which are applicable to the SBEA (Matter of State Bd. of Equalization & Assessment v. Kerwick, 72 AD2d 292), lends support to this determination. The establishment of a rate is considered rule making (see State Administrative Procedure Act, 102, subd 2, par [a], cl [ii]), rather than an adjudicatory proceeding. As such, it has been held that a municipality, which has standing to contest the rate, is not entitled to a formal adversarial hearing (See Matter of County of Nassau v. State Bd. of Equalization & Assessment, 80 AD2d 9.)." Opinion of the trial court herein; J.S. A-21.

weakness in appellant's argument is that the statute under attack says nothing at all about hearings.

Provision for hearing with respect to rate is found in Article 6 of the RPTL, more particularly sections 608 and 610 thereof. As the trial court plainly said (J.S.A - 8, 21) :

> Avenues are available for ConEd to question the rate. A complaint can be voiced in a proceeding brought under Article 6 of the Real Property Tax Law (see Real Property Tax Law, §608) and a hearing will be had thereon.
>
> ...they may request notice of hearings conducted pursuant to section 1208 of the Real Property Tax Law.

Appellant has never yet sought an Article 6 hearing or a hearing under Article 12, more particularly §1208, during the period when the rates are established. It had its first opportunity, along with everybody else, to seek such reviews some thirteen years ago. Since it chose not to do

so then, nor in any of the dozen years thereafter and offers no reason why it should now be relieved of the consequence of this choice, it is clear that there is no reason. It cannot justifiably complain, therefore, that it lacks that which it has never even tried to obtain.

Appellant implies that it never had notice of the rate, and says flatly that only the municipalities are entitled to either notice or a hearing (J.S. 5). This is not so. After SBEA, as required by RPTL §1202, makes an annual finding of the equalization rate in each jurisdiction, the rate becomes a matter of public record and notice. It is filed in various state and local public offices (RPTL §1212) and becomes readily available and well known to all who are affected by it. This is particularly true for all utility companies to which it is a matter of special concern. Then, if ever, is the proper time

to question it. By the time it is thereafter applied to special franchise assessments in the following year, it has been utilized for dozens of other purposes, many of vast importance.[5] The State is under no obligation, constitutional or other, to provide still another hearing opportunity at that late date.

Appellant's contentions that "§744 (1) deprived the appellant of a hearing on its claim that its real property was assessed [unequally]" (J.S. i:2) and that SBEA assessed its real property in a manner contrary to law (J.S. i) are misleading.

As the most cursory inspection of Section 744(1) (Appendix, p. 1) makes

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[5] For instance, limitation of municipal tax, N.Y. Const., Art. VIII, §4; apportionment of state aid to schools, N.Y. Ed. Law, §§3602, 3603; and many other provisions in the RPTL and elsewhere.

clear, it says nothing about hearings. As previously noted, provisions with respect to hearings are set forth in other statutes and regulations as to which appellant does not seek review. The statute of which it complains deprived it neither of a hearing nor anything else.

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930), which appellant urges as controlling (J.S. 14), is barely relevant. There, petitioner was taxed on full value, with no equalization applied at all; here, equalization is mandated by statute (RPTL §606). There, no hearing at all was permitted; here, appellant was not only entitled to a hearing, but given the opportunity to conclude a plenary trial on the value of all four hundred of its special franchise claims. The equalization rates applied to each franchise for each year in each municipality were stipulated by all

parties in the proceedings and at least one opportunity for a hearing on rate always existed.

What the utility really seeks by this litigation is to gain for itself two opportunities to try the question or, at least, to be able to choose between two (or more) procedures. But this raises no constitutional question. While a State may, if it chooses, provide innumerable hearings or hearing opportunities, it is constitutionally required to provide no more than one. The City submits that, with respect to the instant issue, there is no constitutional requirement even for one hearing, and that neither here nor anywhere are two hearing opportunities ever required, particularly where at least one is and always has been available. This being so, there is no federal question presented here and no

other "due process" claim is even propounded.

2. Equal Protection

Appellant argues that all property is in the same "class" (J.S. 10-11): it errs. For purposes of taxation, property has for many years been divided by the New York legislature into two (or more) classes, the two of relevance here being special franchises and all other property. The Court has held that this classification is rational. Cincinnati, New Orleans & Texas Pacific Railroad Co. v. Kentucky (Kentucky Railroad Tax Cases), 115 U.S. 321 (1885). It is established by the legislature and, since 1899, has been what is now set forth in RPTL §606. It was not created by §744 (1), but by all of RPTL Article 6 (J.S. A-10), as well as all of Title 2 of Article 7, §302 and various other statutes.

Appellant offers seven authorities in support of its position, three of which are cited only for the proposition that like properties should be similarly taxed.[6] This is true, but irrelevant. In none of the remaining four was class directly in issue.[7]

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[6] Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923; J.S. 10); Hillsborough Township v. Cromwell, 326 U.S. 620 (1946; J.S. 11); Brinkerhoff-Faris Co. v. Hill, supra, p. 15 (J.S. 11).

[7] Metropolitan Street Railway v. State Board, 174 N.Y 417, 617 N.E. 69, 134 N.Y.S. (1903), aff'd 199 U.S. 1 (1905); Jamaica Water Supply v. State Board, 196 N.Y. 39, 89 N.E. 581, 156 N.Y.S. (1909); Long Island Railroad v. State Board, 104 Misc. 234, 171 N.Y.S. 784 (S. Ct., Kings Cnty 1918), mod. 193 App. Div. 297, 183 N.Y.S.2d 733 (2d Dept. 1920), rev'd 231 N.Y. 221, 131 N.E. 896, 189 N.Y.S. (1921); Staten Island Edison Corp. v. Moore, 6 Misc.2d 1031, 164 N.Y.S.2d 772 (S. Ct., Albany Cnty, 1955), rev'd on other grounds, 6 A.D.2d 369, 177 N.Y.S. 129 (3d Dept. 1961), on remand, 37 Misc.2d 198, 238 N.Y.S.2d 520, affd. 15 AD2d 983, 225 N.Y.S. 2d 520 (3d Dept. 1962), aff'd, 12 N.Y.2d 846, 197 N.E.2d 475, 236 N.Y.S.2d 524 (1962).

However, even so, this Court in Metropolitan Street Railway and the New York Court of Appeals in Jamaica Water upheld the statute which separated special franchise assessments from all other property assessments with regard to the basis factor of who did the assessing.[8] The New York Court in Long Island Railroad upheld the statute[9] which applied a set of procedural rules to all other kinds of real property, but "only so far as practicable, to special franchises.[10] In Staten Island, the Court also upheld the statute[11] that separated

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8 Chapter 712, Laws of 1899, a predecessor of RPTL §606.

9 Chapter 712, Laws of 1899, sections 44 and 45; Chapter 908 Laws of 1896, sections 36 and 250; predecessors of RPTL §740.

10 231 N.Y. 221, 226; 131 N.E. 896, 189 N.Y.S. (1921).

11 Tax Law, former section 45 a predecessor RPTL to §606.

special franchises from all other properties for equalization by SBEA[12].

But there is no need to search so far inasmuch as the appellate court here considered this very argument at some length (J.S. A-9, A-10). The deliberated finding was that the legislature has the power to classify and that the statute in issue was only the enactment of a procedural rule relating to evidence of rate, well within the legislative function.

It might also be pointed out that appellant, despite its frequent claims to the contrary,[13] is not singled out from all other taxpayers in this respect. The State rate is

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12 12 N.Y. 2d 846, 847; 187 N.E.2d 475; 236 N.Y.S.2d 624, 625.

13 e.g., "Other real property of the same class": (J.S. 4); "all other real property" (J.S. 4, 11); "assessments of other real property" (J.S. 4).

also the exclusive equalization method applied to reforestation lands (RPTL § 534), State lands (RPTL, §542) under other sections of the Real Property Tax Law, as well as to all special franchises, not only those held by this appellant.

Finally, whether or not there is but one class of property in New York and whether or not the utility is in that class is a matter of State law. All three courts below said that all utilities and special franchises are in a class of their own, that such a class has a rational basis and, because of its unique features is a proper class. This being so, no federal question is presented. No other equal protection claim is even propounded except as to a hearing, which as demonstrated above, has no merit and also involves no federal question.

Appellant's attack on the constitutionality of RPTL §744(1) for lack of

hearing overlooks the relevant fact that this statute neither provides nor implies anything about a hearing. The availability or unavailability of a hearing on rate depends upon other statutes and provisions. Unless and until those authorities are invoked, the question of statutory constitutionality or any question concerning a hearing cannot be brought before this Court. Indeed, this proceeding is not properly even an appeal, since the statute raises no constitutional question.

This being so, again there is no federal question presented. Even by the broadest possible view, the most that any litigant can ask is to be given a hearing. This Court has never asserted the power to order a State in enacting a law to provide a hearing under one particular article of a law, as against another article of the same title, least of all on constitutional grounds.

The instant proceeding is not, and may never become, ripe for presentation to this Court, because if sufficiently high values are found by the trial court, even the rates sought by the utility would still sustain the assessments and render this proceeding entirely moot.

Appellant seeks to circumvent mootness by stating in a footnote on the authority of City of Philadelphia v. New Jersey,[14] and Cox Broadcasting Corp. v. Cohn,[15] that it has "relinquished" its 1974 values claims and thereby allegedly satisfied the finality requirement (J.S. 2., n. 2). However, these cases do not speak to the principal problem here. The "relinquishment" of a small portion of a consolidated claim, leaving

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14 437 U.S. 617 (1978).

15 420 U.S. 469 (1975).

the other eleven twelfths still at issue, is the emptiest of gestures; all other claims were dismissed with prejudice in City of Philadelphia, leaving nothing sub judice or to be tried.

Worse yet, "relinquishment" of even the entire value claim does not establish value. That establishes only that a petitioner cannot impeach any value against which any rate might ultimately be applied. And that is the reason the 1974 petitions were not merely limited by an order for partial summary judgment, but were dismissed and the assessments confirmed (Appendix, p. 7).

In sum, as to 1974 this proceeding is now moot; as to the next three years it is not yet ripe, there having yet been no decision of full value even at the trial court level, much less at the highest State court level. The same is true of the eight years after that, as to which even the "illegality"

issues are still sub judice at the trial court level.

3. Finality

Literal finality imports a judgment which "must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."[16] Further, in the case of multiple parties, it must be final with respect to all of them.[17] What must have been resolved is all issues, not just principal ones. "[F]or example, where liability has been determined and all that needs to be adjudicated is the

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16 Market Street R. Co. v. Railroad Commission 324 U.S. 548, 551 (1945).

17 Meagher v. Minnesota Thresher Mfg. Co., 145 U.S. 608, 611 (1892); Collins v. Miller, 252 U.S. 364, 370.

amount of damages",[18] the judgment is not final. Lacking all of this, the judgment is not only not technically final, but it is not even practically final.[19]

Nor are the unresolved elements here ministerial[20] or collateral.[21] They go to the very heart of liability itself, much more than did the unresolved accounting elements in such cases as California Nat. Bank[22] or

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18 Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 68 (1948); Collins v. Miller, 252 U.S. 364, 370 (1921).

19 Houston v. Moore, 3 Wheat. 433, 434 (1918); San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 632-3 (1981); O'Dell v. Espinoza, 456 U.S. 430 (1982).

20 Dept. of Banking v. Pink, 317 U.S. 264, 267 (1942).

21 Clark v. Williard, 292 U.S. 112, 117-19 (1934).

22 California Nat. Bank v. Stateler, 171 U.S. 477 (1898).

NAACP[23] which rendered nonfinal the judgments there sought to be reviewed.

The reasons why the rule of finality is the embodiment of important policy issues and not merely an arbitrary abstraction include the avoidance of piecemeal review, of advisory opinions and of excessive federal intrusion in State processes.[24] The rule has its exceptions, particularly when the course of behavior of the parties, or an entire industry, depends upon prompt and authoritative decision. But this case involves no behavioral modification, no otherwise irreparable harm, and no other consideration than money.

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23 NAACP v. Williams, 359 U.S. 550 (1959).

24 North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973).

Nor does this proceeding fit any of the "very few"[25] circumstances which comprise the four categories of cases, adumbrated by Justice White in Cox Broadcasting (supra, p. 21), as to which the Court is prepared to accept a "practical" construction of the finality criterion. This is not a first category case as to which the federal issue cannot be mooted and is conclusive, or in which the outcome of further proceedings is preordained.[26]

This is not a second category case, as to which the federal issue will survive and require decision and the other issues can "not remotely give rise to a federal

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25 Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).

26 As was Mills v. Alabama, 384 U.S. 214 (1966), cited in Cox Broadcasting at 479.

question",[27] as in Brady v. Maryland[28] and Radio Station WOW.[29]

This is not a third category case, as to which later review of the federal question cannot be had regardless of the outcome of the case.[30]

Finally, this is not a fourth category case, where reversal of the State court on the federal issue will preclude further litigation.[31] This is simply, as Justice

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27 Radio Station WOW, Inc. v. Johnson, 326 U.S. at 127, supra, p. 30, n. 29.

28 373 U.S. 83 (1963), cited in Cox Broadcasting at 480.

29 p. 30, n. 28.

30 As were California v. Stewart, 384 U.S. 436 (1966) and North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., supra, p. 29, n. 24, cited in Cox Broadcasting at 481.

31 As was Miami Herald Publishing Co. v. Tornillo, 481 U.S. 241 (1974), cited in Cox Broadcasting at 484.

White concluded his catalog, a matter "controlling the nature and character of, or determining the admissibility of evidence in" a (putative) State proceeding still to come.

Both Cox Broadcasting and City of Philadelphia, supra, p. 25, the only two authorities cited by for the proposition that this case is in proper condition to be presented to this Court are among the strongest authorities for precisely the opposite position. And the City is aware of no authority whatever which suggests that this Court has jurisdiction under 28 U.S.C. §1257 (2), the only source of jurisdiction invoked by appellant (J.S. 2).

One argument to which appellant resorts reflects the self-serving coloring with which it seeks to overcome the lack of merits in its appeal. It claims that:

> [it] has repeatedly urged ... that the equalization rates ... were illegally, intentionally, and

> systematically increased by the State Board for political and other reasons ...
>
> None of the appellees has ever denied the allegations of ... inaccuracies in the equalization rates (J.S. 6).

This notion is obviously of recent vintage. As shown in the 1974 petition, set forth in the Appendix to its Jurisdictional Statement (J.S. A-51 through 56) from which the 1974 Complaint to SBEA and the statement in support thereof, previously annexed thereto and incorporated therein (J.S. A-53, 56) are now deleted, there is not a word in any of them, which remotely suggests that the rates were intentionally and systematically increased for political or other reasons.

The affidavit in which Con Ed first enunciated this idea is not dated in 1974, as it implies; it is dated November 22, 1982 (J.S. A-50), eight years later and long after

this proceeding had been consolidated and the first series of motions were made seeking its dismissal.

Furthermore, the rate allegations in those portions of the petition set forth at J.S.A-51 through 56 urging inequality were explicitly denied in the answer filed in response thereto, and all allegations in the petition are deemed denied by SBEA as a matter of statutory law (RPTL, §712).

In no event does this latest stance support a claim of inequality. If anything, it is a claim of illegality, properly made under New York law, and in fact made by this appellant. But the illegality portion of the claim was either dismissed years ago or is still sub judice at the trial court level (see p. 5 supra). This argument, if such it be, therefore, is not before this Court at all.

CONCLUSION

For the foregoing reasons this appeal should be dismissed or, in the alternative, the order of the Court of Appeals should be affirmed.

Respectfully submitted,

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July 30, 1986

APPENDIX

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NEW YORK REAL PROPERTY TAX LAW, ARTICLE 7

TITLE 2 - Special Provisions Relating to Special Franchise Assessments

§744. Action by court in proceedings to review special franchise assessments

1. In a proceeding to review a special franchise assessment, upon filing of the answer or upon joinder of issue the court may take such evidence as it may deem necessary or may appoint a referee to take evidence and hear and determine all questions raised by the petition and the answer thereto. Notwithstanding any provisions of this article to the contrary, evidence on the issue of whether a special franchise assessment is unequal shall be limited to the state equalization rate or special equalization rate used in determining the final special franchise assessment under review, and such equalization rate or special equalization rate shall be binding and conclusive on the parties upon any such issue. Upon motion of either party the court may order the place of trial changed to the county in which the special franchise under review is situated. The place of trial shall be deemed changed to the county designated and the papers and proceedings shall be certified to that county in a manner provided by law in the case of a change in the place of trial of an action and all subsequent proceedings shall be had in the county so designated as if the special proceedings had been originally instituted in that county.

At a Trial Term of the Supreme Court of the State of New York, held in and for the County of Albany at the State Office Building, 333 East Washington Street, Syracuse, New York, on the 10th day of July 1986.

P R E S E N T :

HON. THOMAS J. LOWERY, JR.,
Acting Supreme Court Justice.

----------x

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., et al.

Petitioner,

-against-

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, et al.,

Respondent and Intervenors-Respondents.

Index Nos. 0278/78 5155/84 4020/85,

ORDER

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Petitioner, Consolidated Edison Company

Appendix - 2

of New York, Inc. ("Con Edison"), having moved for an order declaring RPTL §744(1), as amended by L.1982 Ch. 714, Sections 24 and 29, unconstitutional and void and the respondent, State Board of Equalization and Assessment ("SBEA"), and intervenors-respondents, The City of New York, et al., having cross-moved for an order granting partial summary judgment dismissing those portions of those petitions which seek to establish erroneous assessments by reason of inequality in that the respondent, SBEA, arrived at and applied incorrect equalization rates in establishing special franchise assessments for the tax years 1978/79 through 1985/86 and which seek to establish what the equalization rates should be by substituting equalization rates derived from current sales in each of the taxing units in the place and stead of the equalization rates found by the SBEA on the grounds that

inequality in proceedings commenced pursuant to RPTL §740, may not be proved by resort to evidence reserved for traditional inequality proceedings brought pursuant to RPTL §706 and that petitioner may neither disprove the actual equalization rate utilized by the SBEA nor prove what the equalization rate should be; and said motions having regularly come on to be heard on the 7th day of July 1986;

NOW, upon reading and filing the notice of motion for declaratory judgment of Con Edison dated June 10, 1986, the affidavit of Mark S. Tulis, sworn to June 10, 1986, in support of the motion, the notice of cross-motion, dated June 13, 1986, the affidavit of John P. MacArthur, sworn to June 13, 1986, the affirmation of Lawrence Zimmerman, dated June 23, 1986, the affidavit of Daniel G. Donovan, dated June 27, 1986, the affidavit of Marvin S. Fink,

sworn to June 30, 1986, and the affidavit of Jonathan P. Nye dated July 2, 1986, all in support of the cross-motion and in opposition to the motion; and after hearing Mark S. Tulis, Special Counsel to Con Edison, in support of the motion and in opposition to the cross-motion and John P. MacArthur, Special Counsel to the corporation counsel of the City of New York, and Lawrence Zimmerman, Assistant Attorney General, of Counsel, on behalf of the respondent SBEA, in opposition to the motion and in support of the cross-motion, and due deliberation having been had thereon; and the Court having rendered its oral decision on July 7, 1986, it is

ORDERED, that petitioner's motion seeking to declare Real Property Tax Law §744(1), as amended by L.1982 Ch. 714, Sections 24 and 29, unconstitutional and void is in all respects denied, and it is

FURTHER ORDERED, that the cross-motion by intervenor-respondents, City of New York, et al. be and the same is, in all respects, GRANTED, and that the respondent and intervenor-respondents have partial summary judgment against the petitioner dismissing the portions of those petitions seeking to establish that the petitioner's assessments were unequal in that the equalization rates used by the State Board of Equalization and Assessment in determining the assessment did not represent that ratio between assessed valuation and full valuation in the taxing units where the petitioner's property was situated.

Dated: Syracuse, New York
July 10, 1986

E N T E R:

/s/ Thomas J. Lowery, Jr.
Honorable Thomas J. Lowery, Jr.
Acting Supreme Court Justice

At a Trial Term of the Supreme Court of the State of New York, held in and for the County of Albany at the State Office Building, 333 East Washington Street, Syracuse, New York, on the 10th day of July 1986.

P R E S E N T:

HON. THOMAS J. LOWERY, JR.,
Acting Supreme Court Justice.

----------x

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

-against-

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, et al.,

Respondents,

-and-

VILLAGE OF PLEASANTVILLE, et al.,

Intervenors-Respondents.

FINAL JUDGMENT

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Petitioner, Consolidated Edison Company of New York, Inc., having brought the above-entitled proceedings to reduce the assessments on its special franchise property located in the City of New York and certain Westchester Municipalities in which it owns special franchise property for the 1974/75 tax year; and the issues in the proceedings having duly come on to be heard before the Honorable Thomas J. Lowery, Jr., Acting Supreme Court Justice at a Special Term of this Court, held at the State Office Building, 333 East Washington Street, Syracuse, New York; and

WHEREAS, the proceeding were consolidated with proceedings for tax years 1975/76 through 1977/78 by order of the Supreme Court; and

WHEREAS, the Court having ruled on September 24, 1983 granting the motion of the respondents and intevenors-respondents

granting them partial summary judgment against the petitioner dismissing the portions of the petitions seeking to establish that the assessments of petitioner's property were unequal in that the equalization rates used by the State Board of Equalization and Assessment ("SBEA") in determining the assessment did not represent the ratio between the assessed valuation and full valuation in the taxing units where petitioner's property was situated and further denying petitioner's cross-motion seeking to declare RPTL §744(1), as amended by L.1982 Ch. 714, Sections 24 and 29, unconstitutional and void; and said order having been affirmed by the Appellate Division Third Department and the Court of Appeals; and,

WHEREAS, petitioner has consented solely with respect to the above-entitled proceedings to accept as the full value of

petitioner's property the values set forth in the appraisals of the SBEA submitted in evidence at trial for its "Frozen Base" and "Subsequent" property without admitting to the correctness of the SBEA's appraisals for other proceedings or years;

NOW, on motion of Rosenberg & Tulis, Special Counsel for petition[er], it is adjudged and decreed as follows:

1. The proceedings set forth above are hereby severed from the proceedings for tax year 1975/76 through 1977/78, and are separately consolidated for disposition.

2. RPTL §744(1), as amended by L.1982 Ch. 714, Sections 24 and 29, is declared constitutional and applicable to the within proceedings.

3. The assessments in question are hereby confirmed and the petitions dismissed, without costs.

Judgment signed this 10th day of July 1986.

/s/ Thomas J. Lowery, Jr.
Thomas J. Lowery, Jr.

ConEd FinalJudg/Pleasantville2.070186

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